

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROCHELLE SWEET, JR.,	:	
Plaintiff,	:	
	:	
v.	:	Civil No. 97-2210
	:	
BELL ATLANTIC-PENNSYLVANIA, INC.,	:	
Defendant.	:	

M E M O R A N D U M

Cahn, C.J.

April _____, 1998

Plaintiff Rochelle Sweet, Jr. ("Sweet") claims that Defendant Bell Atlantic-Pennsylvania, Inc. ("Bell") terminated his employment in violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213 (1994), and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951-963 (West 1991 & Supp. 1997). Before the court is Bell's motion for summary judgment. For the reasons that follow, the court will grant the motion.

I. BACKGROUND

The evidence, viewed in the light most favorable to Sweet, establishes the following relevant facts. Sweet began working for New Jersey Bell in 1976. In 1989, Sweet accepted a transfer to Bell's¹ facility located in Conshohocken, Pennsylvania, where he began working as an Office Clerical Assistant ("OCA"). That

¹ At the time of the transfer, Defendant was known as Bell Telephone Company of Pennsylvania, Inc.

same year, Sweet moved to Reading, Pennsylvania, to live in and maintain his deceased-father's home. In 1990, Sweet accepted a transfer to a vacant OCA position at Bell's central mail-distribution facility located in Norristown, Pennsylvania (the "Norristown facility").² With the exception of several months in 1991, during which Sweet worked in Philadelphia, Sweet worked at the Norristown facility as an OCA for the remainder of his employment with Bell.

According to Bell's written job description, an OCA's "general duties" relate to "[p]erforming work . . . associated with the receipt and distribution of U.S. and company mail." (Def.'s Ex. B-1.) Such work may involve "[r]eceiving, sorting and delivering packages;" "[c]arrying, lifting and moving articles . . . weighing up to 70 pounds using a hand truck," which "[i]nvolves bending and overhead reaching;" "[a]ssisting in loading and unloading supplies;" and "[d]riving a company vehicle." (Id.) One of the "basic requirements" of the OCA position is the "[a]bility to lift and carry cartons of paper, records and supplies weighing up to 70 pounds, without the aid of another person or use of a mechanical device." (Id.) According to Gerard Quinlan ("Quinlan"), a manager in charge of sorting and distributing mail for Bell, "[a]pproximately 50% of Mr. Sweet's

² The Norristown facility is also known as the Valley Forge facility or the Trooper facility.

job as an OCA required lifting and/or carrying packages or mail bags which weighed more than ten to fifteen pounds." (Def.'s Ex. B ¶ 4.)

Sweet considers the OCA job to be that of a "mail sorter," and describes his OCA duties as essentially involving: (1) stamping and sorting mail, which required standing "for extended periods of time" as well as "a lot of lifting, bending, [and] twisting;" and (2) "moving large packages, anywhere from 5 pounds up to 90 to 100 pounds or in excess of that . . . some manually, one person, some with two people, some using [a hand truck]." (Def.'s Ex. A ("Sweet Dep.") at 8, 22.)

During the period between Sweet's injury and his termination, the OCA position was the second-lowest-level position at Bell. The lowest-level position was Assistant Technician ("AT").³ Thus, during that time, any non-OCA position other than AT represented a promotion from the OCA position.

In March, 1992, Sweet injured his back at work while pulling heavy mail bags off a pallet. Soon thereafter, Sweet informed his supervisor, Rich Burke ("Burke"), that because of his injury he could not continue doing the work he previously had done as an OCA. Bell's medical department restricted Sweet to light-duty work. In August, 1992, Sweet was diagnosed with two herniated

³ According to Bell's written job description, the "general duties" of the AT position include "[t]raveling to work locations by driving Company [sic] vehicle." (Def.'s Ex. F-1.)

discs. On December 15, 1992, Sweet took a medical leave from work on the recommendation of his doctor, David Allen. Sweet did not return to work before Bell terminated his employment on May 22, 1995.

At all relevant times, Sweet's injury left him unable to: lift more than ten pounds; stand for more than an hour at a time, or for more than an hour during an eight-hour day; walk for more than half an hour at a time, or for more than half an hour during an eight-hour day; use his feet for repetitive movement in the pushing and pulling of leg controls; or travel in a motor vehicle for more than fifteen to twenty minutes at a time (the "driving restriction"). In addition, marked changes in temperature or humidity affected Sweet's back, and prolonged periods involving simple grasping, pushing, or pulling of arm controls, or fine manipulation (such as sorting), caused pain in his back and arms.⁴

On several occasions after moving to Reading but before being injured, Sweet requested a transfer to a job in a Bell facility located in either Reading or Pottstown, Pennsylvania.

⁴ The precise contours of Sweet's physical limitations since being injured are in dispute. Dr. Allen's conclusions differ from the conclusions of Dr. Robert Cohen and Dr. Stephen Horowitz, each of whom also examined Sweet following his injury, at Bell's request. Of particular significance is the fact that Dr. Cohen and Dr. Horowitz, upon whose conclusions Bell relies, did not impose the driving restriction on Sweet. Because Sweet relies on Dr. Allen's conclusions, so does the court for purposes of its summary judgment analysis.

Sweet made his transfer requests primarily through Bell's Upward Mobility Transfer Program (the "UMTP"). Sweet's aims were to work closer to home and get a promotion. Bell denied Sweet's transfer requests.

In 1992, after being injured, Sweet spoke with Burke, Tom Miller ("Miller"), Norm Armstrong ("Armstrong"), and Jean Guyer ("Guyer").⁵ Sweet asked each of them for a transfer to a job in Reading that would accommodate his physical limitations, and suggested that Bell could create such a job for him. Sweet explained that he needed to work in Reading because the driving restriction precluded him from commuting to the Norristown facility, which is a forty-five to sixty-minute drive from Sweet's home. In each case, Sweet was told to request transfer through the UMTP.

In early 1993, Brenda Oliver ("Oliver"), a disability nurse for Bell, contacted Sweet by telephone to discuss Sweet's situation. During Sweet's remaining employment with Bell, Oliver had frequent contact with Sweet and Dr. Allen regarding Sweet's injury and ability to work. In several discussions beginning sometime in 1993, Oliver asked Sweet to return to work at the Norristown facility. Oliver proposed several different light-duty modified-work assignments that Bell could give Sweet, and

⁵ Miller and Armstrong were supervisors, and Guyer was an assistant manager, at the Norristown facility.

Sweet concedes that, but for their location in Norristown, the proposed assignments accommodated his physical limitations. Citing the driving restriction, Sweet informed Oliver that he could no longer work at the Norristown facility.

Oliver suggested various ways to get Sweet to the Norristown facility within the limits of the driving restriction. Oliver suggested that Sweet drive to the Norristown facility in fifteen to twenty-minute increments, stopping to rest between each one. Oliver also suggested that Sweet take the bus to the Norristown facility. Finally, Oliver suggested that Bell send a taxi to drive Sweet to and from the Norristown facility.

Sweet rejected each suggestion on the ground that it did not accommodate the driving restriction. Sweet's position is that "no matter what job or what duties the company had given [him] in Norristown, [he] would not have been able to get to Norristown to do the duties." (Sweet Dep. at 17.) Sweet never considered moving out of Reading and closer to the Norristown facility, however, and when asked at his deposition why he did not consider such a move, Sweet stated that such a move would be unreasonable. Sweet informed Oliver that he wanted to be transferred to a suitable job in Reading. Oliver responded that no such jobs were available,⁶ and that Bell was not required to relocate Sweet.

⁶ During the period between Sweet's injury and his termination, there were no OCA positions, vacant or filled, at Bell's facilities in the Reading area.

By letter dated January 25, 1995, Burke notified Sweet that Bell considered Sweet able to return to work at the Norristown facility, with modified duties to accommodate the physical limitations found by Dr. Cohen. See supra note 4. Burke directed Sweet to report to work on February 1, 1995. Sweet did not return to work.

On April 21, 1995, in a telephone conversation and by follow-up letter, Oliver notified Sweet that Sweet was eligible to return to work on April 24, 1995, with modified duties to accommodate the physical limitations found by Dr. Horowitz. See supra note 4. Sweet did not return to work.

By letter dated May 10, 1995, Burke notified Sweet that if Sweet did not return to modified work by May 22, 1995, Bell would dismiss Sweet from the payroll. After receiving Burke's letter, Sweet telephoned Burke on May 16, 1995, and informed Burke that Sweet was acting according to the physical limitations found by Dr. Allen, not Dr. Horowitz. Accordingly, Sweet did not return to work. By letter dated May 22, 1995, Burke notified Sweet that Bell had terminated Sweet's employment effective that day.

Sweet instituted this action on April 9, 1997. In his amended complaint, Sweet claims that Bell terminated his employment in violation of the ADA and the PHRA. Bell filed the instant motion for summary judgment on December 3, 1997.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In addition, a dispute about material facts must be "genuine," such that a reasonable jury could return a verdict for the nonmoving party. Id. The moving party has the initial burden of producing evidence purporting to establish the absence of a genuine issue of material fact; however, if the nonmoving party fails to produce sufficient evidence with respect to an essential element of its claim and for which it will bear the burden of proof at trial, then the moving party is entitled to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). If the moving party meets its burden, the nonmoving party must come forward with specific facts contradicting those set forth by the moving party, thereby showing that there is a genuine issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990). Although the court considers the nonmovant's evidence as true and

draws all reasonable inferences in the nonmovant's favor, see Anderson, 477 U.S. at 255, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

B. Sweet is Not an "Otherwise Qualified" Individual

The ADA prohibits discrimination by an employer against a "qualified individual with a disability" on account of the disability with respect to various employment-related matters, including termination. 42 U.S.C.A. § 12112(a) (West 1995).

Under the ADA, discrimination includes, in relevant part:

not making reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer].

Id. at § 12112(b)(5)(A). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id. at § 12111(8). "Reasonable accommodation[s]" include "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations for individuals with disabilities." Id. at § 12111(9)(B).

To present a prima facie case of discrimination pursuant to the ADA, a plaintiff must demonstrate that:

(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination.

Gaul v. Lucent Technologies Inc., 134 F.3d 576, 580 (3d Cir.

1998). It is undisputed that Sweet is disabled within the meaning of the ADA, and thus satisfies the first element. The issue is whether Sweet meets his burden of showing that he is an "otherwise qualified" individual, and thus satisfies the second element. See id. (holding that the "burden is on the employee to prove that he is 'an otherwise qualified' individual") (citation and internal quotation marks omitted). Sweet suggests that he is an "otherwise qualified" individual because, after being injured, he could have performed the essential functions of a job at Bell with reasonable accommodation. According to Sweet, reasonable accommodation would have entailed: (1) transferring him to one of Bell's facilities in the Reading area; and (2) giving him light-duty modified-work assignments of the type that Bell had offered him at the Norristown facility, or, in the alternative, reassigning him to an existing non-OCA position requiring only sedentary or light-duty work.

In order for an ADA plaintiff's proposed accommodation to be reasonable, the plaintiff must "make at least a facial showing that his proposed accommodation is possible." Id. Mere theoretical possibility is insufficient. Here, Sweet must

"demonstrate that there were vacant, funded positions whose essential duties he was capable of performing . . . and that these positions were at an equivalent level or position as his former job." Id. (citation, internal quotation marks, and brackets omitted). The ADA does not require Bell to create a new position specifically for Sweet to accommodate his disability. See Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996) (interpreting the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.);⁷ see also Rucker v. City of Philadelphia, Civ. A. No. 94-0364, 1995 WL 464312, at *3 (E.D. Pa. Jul. 31, 1995) ("[T]he ADA does not mandate that the employer create a 'light duty' or new permanent position."), aff'd, 85 F.3d 612 (3d Cir. 1996). In addition, Bell is not required to accommodate Sweet's disability by promoting him. See Shiring, 90 F.3d at 832.

Sweet's proposed accommodation fails to satisfy the "reasonableness" criteria described above because Sweet fails to identify a vacant, funded position at or below the OCA level, that existed during the relevant time period in the Reading area or elsewhere, the essential duties of which he could have

⁷ The ADA's text suggests that case law interpreting analogous portions of the Rehabilitation Act of 1973 be incorporated by reference in construing the ADA. See 42 U.S.C.A. § 12201(a) (West 1995). Shiring's discussion of "reasonable accommodation" is also relevant given that "in 1992 the Rehabilitation Act was amended to incorporate the standards of several sections of the ADA, including the section defining 'reasonable accommodation.'" Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997) (footnote and citation omitted).

performed with reasonable accommodation.

On the undisputed facts of the record, no such position existed. The only positions at or below the OCA level during the relevant time period were OCA and AT. The court finds that no reasonable accommodation would have permitted Sweet to perform all the essential functions of either position. This conclusion follows from Quinlan's testimony that "[a] person who was unable to lift more than ten to fifteen pounds, or even twenty pounds, on a frequent basis, would be unable to perform the essential functions of the OCA position," (Def.'s Ex. B ¶ 4), a contention that the written job description supports.⁸ With respect to the AT position, the written job description supports the testimony of Eleanor Walker, an assistant manager in Bell's human resources department, that the driving restriction would have prevented Sweet from performing an essential function of that job. (See Def.'s Ex. F ¶ 3.) Bell was not required to accommodate Sweet's inability to perform the essential job functions referenced above by eliminating them. See Rucker, 1995 WL 464312, at *3.

In light of the foregoing analysis, Bell's continued employment of Sweet after he was injured would have required assigning Sweet to a position other than OCA or AT. In other

⁸ "[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description . . . , this description shall be considered evidence of the essential functions of the job." 42 U.S.C.A. § 12111(8) (West 1995).

words, Bell would have had to promote Sweet or create a position for Sweet, neither of which outcome the ADA requires. Although the record does show that Bell offered to create a light-duty modified-work position for Sweet at the Norristown facility, (see Tr. of 1/22/98 Burke Dep. at 31), the ADA does not require such an accommodation, at the Norristown facility or elsewhere. Bell chose, for whatever reason, to exceed its obligation to Sweet under the ADA, and Sweet declined Bell's offer.

For the reasons described above, the court finds that Sweet's proposed accommodation is unreasonable as a matter of law. It follows that Sweet has failed to meet his burden of showing that he is an "otherwise qualified" individual, and that Sweet has not established a prima facie case of discrimination under the ADA.

C. Sweet's PHRA Claim is Coextensive With His ADA Claim

Although they are not bound to do so, Pennsylvania courts generally interpret the PHRA in accord with its federal counterparts, among them the ADA. See Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996). The Third Circuit Court of Appeals has held that a claim under the PHRA is coextensive with a claim under the ADA. See id. Accordingly, the court's analysis of Sweet's ADA claim applies equally to his PHRA claim, and Sweet's PHRA claim fails.

III. CONCLUSION

Sweet suffered a serious on-the-job injury. As a result, he faced the understandably difficult choice of moving closer to the Norristown facility and returning to work, or staying in Reading and not returning to work. Sweet chose the latter course. That Sweet found himself forced to choose, and that his choice led to his termination, was certainly unfortunate, but it was not because Bell violated the ADA or the PHRA. In fact, the choice Bell offered Sweet was more than either act requires.

For all the foregoing reasons, the court will grant Bell's motion for summary judgment.

An appropriate order follows.

BY THE COURT:

Edward N. Cahn, C.J.